No. 95-1872 (13)

In The

Supreme Court of the United States

October Term, 1996

WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE, TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, ET AL.,

Petitioners,

v.

A-1 CONTRACTORS AND LYLE STOCKERT,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE FOR STATES OF MONTANA, ARIZONA, CALIFORNIA, COLORADO, IDAHO, MASSACHUSETTS, MISSISSIPPI, NEVADA, NEW YORK, SOUTH DAKOTA, UTAH, WASHINGTON, WISCONSIN AND WYOMING IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indian tribal court has jurisdiction to adjudicate a tort suit brought by a nonmember plaintiff against a nonmember defendant arising out of an automobile accident that occurred on a state highway within the reservation?

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The amici curiae States, through their respective Attorneys General, respectfully submit a brief pursuant to S. Ct. R. 37.2 in support of Respondents.

INTEREST OF THE AMICI STATES

Each State appearing as amicus curiae has within or adjacent to its borders one or more Indian reservations. These reservations were initially created as areas where the affected tribe's members would have exclusive occupancy rights. In many instances subsequent federal laws and policies eliminated that territorial exclusivity. It is thus now quite common that many of the residents of Indian reservations are not members of the involved tribe and that a significant proportion of the land is held by nonmembers.[1] Moreover, the same federal laws and policies which resulted in the introduction of nonmembers onto Indian reservations also resulted in state governments extending their services to many reservation areas and citizens, and to the formation of local governmental entities under state law. The complex land ownership and demographic patterns now characterizing many Indian reservations thus raise difficult questions whenever, as here, the involved tribe seeks to extend its governmental powers to persons and entities who are not part of its political community. Confusion over the principles which

[1] In 1990, of the total of 808,163 people residing on Indian reservations only 437,431 were Indians. Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population: General Population Characteristics: American Indian and Alaska Native Areas* (CP-1-1a) (Nov. 1992).

provide the answer to that question creates substantial uncertainty in the conduct of economic and governmental affairs on Indian reservations. The amici States thus have a general interest in the development of coherent, analytically sound rules governing the scope of tribal jurisdiction.

The amici States also have a specific interest in how this case is resolved since many of them, their political subdivisions, or their officers are being sued with increasing regularity in tribal courts.[2] Apart from defenses they may raise in those actions that are unique to their sovereign status,[3] a decision in this case addressing the nature and scope of tribal court jurisdiction may directly affect the amici States' ability to defend their governmental and proprietary interests in existing and future cases. Petitioners' argument that the involved highway right-of-way granted to the State of North Dakota should be

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[2] *See, e.g., Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (tribal court lacked jurisdiction to invalidate state property tax on Indian-owned fee land); *Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996) (tort action against state in tribal court arising from auto accident on federally-granted right-of-way), *appeal docketed*, No. 96-35766 (9th Cir. July 18, 1996); *Montana v. Sollars*, No. CV-96-010-GF-PGH (D. Mont., filed Apr. 14, 1995) (tort action against state in tribal court arising from auto accident on federally-granted right-of-way); *Lewis County, Idaho v. Allen*, No. 94-35979 (9th Cir., *appeal docketed* Oct. 11, 1994) (appeal involving civil rights action in tribal court against county and county sheriff); *Nevada v. Hicks*, No. CV-N-94-351-DWH, 1996 WL 600865 (D. Nev. Sept. 30, 1996) (claims by tribal member against state game wardens arising from on-reservation search and seizure).

[3] *See Gilham*, 932 F. Supp. at 1219-23 (state immune from tort action in tribal court).

treated as "Indian land" for jurisdictional purposes is thus of immediate concern to the amici States because most hold federally-granted highway rights-of-way through Indian reservations and engage on those rights-of-way in sovereign functions carrying substantial risk of suit.

But beyond immediate concerns over tort liability for highway-related matters is the potential of tribal court litigation and coercive relief to regulate the discharge of the States' more general governmental responsibilities on Indian reservations. Since tribes and their courts are not subject to the constitutional restraints, such as the Tenth and Eleventh Amendments, which operate as a check on federal power vis-à-vis the States, accepting the broad "territorial" view of tribal court power advanced by Petitioners and their amici may threaten to radically reshape traditional notions of state sovereignty. These concerns are heightened by the possible unavailability of federal court review with respect to the merits of claims decided by tribal courts. The ramifications of the decision here to the amici States are therefore very significant.

SUMMARY OF THE ARGUMENT

The question whether the court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation has jurisdiction to adjudicate a tort suit brought by a nonmember plaintiff against a nonmember defendant arising out of an automobile accident that occurred on a state-owned right-of-way on the Reservation requires an analysis of three related questions. The first involves an

examination of the general principles guiding the Court's conception of tribal sovereignty. The second focuses on whether there is any basis to Petitioners' claim that there are different rules for determining the existence of tribal authority in regulatory and adjudicatory contexts. The third, and perhaps most important, is whether there is any basis to conclude that the Tribes possess inherent or other authority over the instant matter.

1. This Court's Indian law jurisprudence has consistently recognized the unique nature of tribal sovereignty, and has often focused on reconciling two fundamental – and competing – principles. The first is that tribal powers of self-government are neither based in nor constrained by the Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The second is that Indian tribes, due in large part to acts of Congress, no longer possess the type of territorial hegemony they once did. *Montana v. United States*, 450 U.S. 544 (1989). Because political consent lies at the core of governance under the Constitution (*e.g.*, *Duro v. Reina*, 495 U.S. 676 (1990)), the Court has held that "the exercise of tribal self-government beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. Conspicuously missing from this Court's decisions is the view proposed by Petitioners that tribal sovereign powers are "territorial" in the same sense that state or federal sovereign powers are.

2. The court of appeals correctly concluded that the scope of tribal adjudicatory power is to be determined by reference to *Montana* and its progeny and that decisions

of this Court dealing with tribal adjudicatory matters, most importantly *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), do not establish a different rule. In *Montana* and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court spoke generally to the scope of tribal authority over nonmembers, limiting neither its discussion nor its rationale to regulatory issues arising on fee lands. *Iowa Mutual* dealt with whether diversity jurisdiction under 28 U.S.C. § 1332 should be exercised over a claim by an insurance carrier against a tribal member growing out of a reservation-based accident and an existing tribal court proceeding. In concluding that such jurisdiction should not be exercised, the Court said nothing about the jurisdiction of tribal courts over nonconsenting nonmember defendants.

Petitioners' related argument that the involved right-of-way remains "Indian land" for jurisdictional purposes is inconsistent with the principle reaffirmed most recently in *South Dakota v. Bourland*, 508 U.S. 679 (1993), that an Indian tribe's regulatory power over nonmembers is primarily a function of its right to condition access to or continued use of tribal lands. Since the granting of the right-of-way easement by the federal government to the State of North Dakota divested the Three Affiliated Tribes of any power to exclude nonmembers from those lands, it necessarily divested them of any lesser-included regulatory powers.

The broad assertion made by Petitioners' amici that a sovereign's adjudicatory authority may exceed its regulatory authority suffers from three main flaws. First, as the court of appeals correctly observed, in deciding a case a court effectively regulates conduct. That principle applies

whether it is the forum's law or another sovereign's law that is being applied. Second, tribal sovereignty is sufficiently dissimilar to that of state or federal sovereignty to make generalizations from one to the other inappropriate. Third, a sovereign's judiciary is no more than an instrument by which it exercises preexisting authority to affect the involved legal interests. It is thus necessary to inquire in the first instance whether the sovereign has the power to affect the involved legal interests. If it does not, a fortiori its courts do not.

3. The court of appeals correctly concluded that neither "exception" discussed in *Montana* provides a basis for tribal court jurisdiction. The first, or consent, exception has not been satisfied because the Three Affiliated Tribes lacked the power to exclude Respondents from the state highway where the accident occurred. Petitioners' argument that consent should be presumed from the fact that respondent A-1 Contractors had a business relationship with the Tribes overlooks the fact that it and its employees possessed the right to be on the state highway independent of that business relationship. No tribal court jurisdiction exists under the second *Montana* exception since it does not serve as a basis for direct tribal authority over nonconsenting nonmembers.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY RECOGNIZED THAT THE DEPENDENT SOVEREIGN STATUS OF INDIAN TRIBES CARRIES WITH IT A GENERAL DIVESTITURE OF AUTHORITY OVER NONMEMBERS AND THAT TRIBAL TERRITORIAL AUTHORITY IS OF A UNIQUE AND LIMITED NATURE.

Indian tribes, while possessing incidents of sovereignty, are not comparable to States or local governments but instead possess unique legal characteristics identified early in this Nation's jurisprudence. Among those unique characteristics is the extent of tribal authority with respect to nonmembers who live on, conduct business within, or pass through reservations. The scope of that authority, in turn, must be measured against this Court's quite consistent view of the nature of tribal sovereignty – a view which runs largely if not entirely counter to the notion that tribes possess a form of "territorial" governmental jurisdiction comparable to that of States. Two basic threads of this Court's Indian law jurisprudence explain why.

The first of those threads is that Indian tribes possess powers of internal self-government that are neither based in nor constrained by the Constitution. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 57; *Talton v. Mayes*, 163 U.S. 376 (1896). Indian tribes' inherent powers of self-government are of a kind "unknown to any other sovereignty in the Nation" (*Brendale*, 492 U.S. at 433 (Stevens, J., concurring in part and dissenting in part)), a fact that reflects they are not party to the federal Union. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1990). Thus, where

extant, Indian tribes' inherent powers of self-government allow them to govern in ways that would "be intolerable in a non-Indian community." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (Stevens, J., dissenting); *Santa Clara Pueblo*, 436 U.S. at 56.

The second thread recognizes that Indian tribes are no longer independent nations and have been incorporated into our Nation's social and political fabric. Of necessity, however, this incorporation involved the divesture of Indian tribes' preexisting sovereign powers to determine independently their relations with persons who are not part of their self-governing political community. If, as Chief Justice Marshall observed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832), under the "settled doctrine of the law of nations . . . a weaker power does not surrender its independence – its right of self-government, by associating with a stronger, and taking its protection," the correlative principle is also true: that such retained self-government rights empower the weaker power to do no more than to "maintain [its] own laws and usages and customs over [its] own race, [and to] regulate [its] own private rights and affairs according to [its] own municipal jurisprudence." Joseph Story, *Commentaries on the Conflict of Laws* § 2a (1865). This correlative principle is reflected in Justice Johnson's oft-quoted statement in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 145 (1810), that "[a]ll the restrictions upon the right of soil in the Indians[] amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."

The Court's modern decisions have carried forward this view of inherent tribal sovereignty. *See Bourland*, 508 U.S. at 694-95 ("[a]lthough Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to control internal tribal relations, . . . the 'exercise of tribal self-government beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation' "). Thus, as reiterated most recently in *Bourland*, Indian tribes' sovereign powers are grounded in notions of self-government (*e.g.*, *Duro*, 495 U.S. at 684-86) or federal delegation (*e.g.*, *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975)).

Conspicuously missing from this formulation of inherent tribal authority are notions of "territorial" sovereignty – i.e., sovereignty defined by territorial rather than intratribal political reach. Such notions at the time of Chief Justice Marshall's seminal opinions were largely immaterial because national policy and "[t]he actual state of things" (*Worcester*, 31 U.S. (6 Pet.) at 560) reflected the fact that tribes and their members largely were segregated from non-Indians in areas set aside for their exclusive use and occupancy. *See generally* Francis Paul Prucha, *The Great Father* 89-98, 179-81 (1984). Territorial and intratribal political governance were accordingly coextensive. That identity was fractured by passage of the General Allotment Act (Act of Feb. 8, 1887, 24 Stat. 388) and subsequent legislation seeking to assimilate tribal members into non-Indian economic and social cultures

through fee patents to Indians and by opening reservations to settlement by non-Indians. Prucha, *supra* at 666-71, 864-85. "The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*" (*Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)) with respect to the existence of state authority in Indian country simultaneously broke down as non-Indian settlers brought with them not only their culture but also their government and, culminating with the Act of June 24, 1924, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)), as Indians themselves assumed citizenship. Prucha, *supra* at 681-86, 793-94, 895-96. That "conceptual clarity" likewise broke down with respect to claims of tribal "territorial" sovereignty. *Montana*, 450 U.S. at 559, n.9; *see also Duro*, 495 U.S. at 685 ("A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory. . . . *Oliphant* [*v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)] recognized that the tribes can no longer be described as sovereigns in this sense").

The amici States do not suggest, of course, that the scope of tribal sovereignty is wholly divorced from territorial considerations. *See Merrion*, 455 U.S. at 142 ("[w]e do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). It is nevertheless perhaps inaccurate to describe the exercise of tribal authority based on the control of territory and the concomitant right to exclude as giving rise to "inherent" authority over nonmembers. In such a situation, that authority depends as a usual matter upon the regulated party's consensual determination to enter an area under tribal

ownership as to which the tribe has conditioned initial or continued access upon acceptance of general or specific forms of tribal civil regulation. However, regardless of whether authority exercised under those circumstances properly is characterized as "inherent," no real dispute exists that notions of purely "territorial" jurisdiction have a limited role in determining whether tribes have authority to adjust the legal responsibilities of nonmembers and, in practical terms, relate to the consent prong of those exceptions. *See generally* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809 (1996). It is against this backdrop that the issues here must be decided.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT TRIBAL CIVIL ADJUDICATORY AUTHORITY MUST BE DETERMINED BY REFERENCE TO THE SAME PRINCIPLES WHICH GOVERN TRIBAL CIVIL REGULATORY JURISDICTION.

As the court of appeals correctly concluded, the limitations on Indian tribes' governmental powers over nonmembers apply, by their very nature and origins, to exercises of judicial power every bit as much as they do to exercises of regulatory power. Pet. App. at 8; *accord Yellowstone County*, 96 F.3d at 1175. Petitioners and their amici present three basic arguments for carving out a judicial powers exception, none of which is tenable. Petitioners' initial argument is that *Montana*, *Brendale*, and *Bourland* did not speak to tribal adjudicatory jurisdiction and thus did not alter the general rule they claim was

enunciated in what the court of appeals called the "adjudicatory jurisdiction" cases of *Williams v. Lee*, 358 U.S. 217 (1957), *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual*: that Indian tribes retain full "territorial" jurisdiction over all persons on the reservation unless that jurisdiction has been expressly divested by Congress. Br. of Pet'rs at 23-24. Second, Petitioners argue that the involved highway right-of-way is "Indian land," thus taking this case outside the factual context of the "regulatory jurisdiction" cases. Br. of Pet'rs at 19-23. Petitioners' amici make one additional argument meriting a response: that general conflict-of-laws principles support the notion that Indian tribes' adjudicatory authority may exceed their regulatory authority. Br. for United States as Amicus Curiae at 20-21; Br. of Assiniboine & Sioux Tribes et al., Amici Curiae at 12-13.

A. The Petitioners Incorrectly Portray *Williams v. Lee*, *National Farmers Union* and *Iowa Mutual* as Addressing the Merits of the Tribal Adjudicatory Jurisdiction Issues.

Petitioners plainly misread the "adjudicatory jurisdiction" cases. The holding of the first, *Williams v. Lee*, was that the Arizona state courts lacked jurisdiction over an action brought by a nonmember against a tribal member to enforce an on-reservation commercial agreement. The Court grounded its opinion in Arizona's failure to seek such jurisdiction under Public Law 280 and because the exercise of jurisdiction by a state court over an Indian "would undermine the authority of tribal courts over Reservation affairs" under the circumstances of that case. 358 U.S. at 223. The Court's discussion of tribal court

jurisdiction therefore was directed at explaining the absence of *state* court jurisdiction and why it was reasonable for a nonmember who had done business with a tribal member on a reservation to resort to tribal court to enforce his contract. *Id.* While the *Williams v. Lee* Court implicitly found that the involved tribal member could have been made an involuntary defendant in tribal court, it did not speak to the converse situation, i.e., whether a *nonmember* may be made an involuntary defendant in tribal court.

In the other two cases, *National Farmers Union* and *Iowa Mutual*, this Court did not hold that the tribal court had jurisdiction over the nonmember tribal court defendant. It held that the tribal court would have the first opportunity to decide whether jurisdiction existed. *Iowa Mutual*, 480 U.S. at 19; *National Farmers Union*, 471 U.S. at 857. Thus, in *National Farmers Union* this Court explained, after citing to several civil regulatory cases,[4] that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." The *National Farmers Union* Court did not

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[4] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) (state authority to regulate nonmember hunting on reservation); *Merrion*, 455 U.S. at 137 (tribal authority to impose tax on oil and gas lessee); and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) ("*Colville*") (tribal authority to impose sales tax on nonmember cigarette purchasers at tribal smokeshops).

address the merits of the jurisdictional issue, since to have done so would have defeated the very purpose of the exhaustion requirement and the availability of collateral federal court review under 28 U.S.C. § 1331 upon such exhaustion. 471 U.S. at 855-56.

The issue in *Iowa Mutual* was not whether the involved tribe had adjudicatory jurisdiction over the underlying personal injury suit but whether diversity jurisdiction existed under 28 U.S.C. § 1332 to entertain the insurer's contract coverage claim *against* a tribal member. *See Iowa Mutual*, 480 U.S. at 20 (Stevens, J., concurring in part and dissenting in part). The Court's reference to "civil jurisdiction" presumptively lying in tribal courts as to nonmember activity "unless affirmatively limited by a specific treaty provision or federal statute" thus was not intended to prescribe a new test for determining any jurisdictional challenge which might be mounted later, since such a rule would conflict directly with the standard articulated two years earlier in *National Farmers Union* and, in any event, would be inconsistent with the inherent tribal authority decisions the Court pointed to immediately preceding that statement – *Montana* and *Colville*. Rather, this aspect of *Iowa Mutual* must read in the context of the insurer's attempt to use diversity jurisdiction to sue a tribal member with respect to a claim growing directly out of a reservation accident. In short, *Iowa Mutual* presented an issue with respect to the exercise of diversity jurisdiction analogous to that in *Williams v. Lee* – a fact the Court made clear by its citation to *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam), a case concerned with state court jurisdiction over an

adoption proceeding where all parties were tribal members residing on a reservation; it did not intimate the answer to, and instead expressly reserved for later litigation if necessary, the question whether the Blackfeet tribal court possessed jurisdiction over the insurer. 480 U.S. at 19, 20 n.13. It is thus unsurprising that four members of the Court rejected Petitioners' expansive reading of this aspect of *Iowa Mutual* in *Brendale*. *See Brendale*, 492 U.S. at 427 n.10 (White, J.).[5]

B. The Fact That the Tribes May Retain a Servient or Reversionary Interest in the Subject Highway Right-of-Way Does Not Render It "Indian Land" For Jurisdictional Purposes.

Petitioners suggest that since the involved automobile accident took place on a right-of-way granted to the State of North Dakota under the Indian Rights-of-Way

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[5] Petitioners' amici additionally suggest that the existence of tribal court jurisdiction over the instant matter is demonstrated by the fact that Congress passed various acts relating to tribal courts based on the understanding that they possessed full territorial jurisdiction. Br. for United States as Amicus Curiae at 3-6; Br. of Assiniboine & Sioux Tribes et al., Amici Curiae at 8-11. However, nowhere in the statutes to which the amici refer did Congress actually delegate such authority to tribal courts. In the absence of a specific delegation, Congress's assumptions, aspirations or policies are simply irrelevant to the question whether the tribal court possesses such authority as an attribute of the tribes' inherent powers that owe their existence to authority predating this continent's discovery by Europeans, much less this Nation's formation. Simply put, Congress can delegate federal authority to tribes at least in some circumstances (*e.g.*, *Mazurie*, 419 U.S. at 556-58), but it cannot confer nonfederal, inherent powers by legislative fiat.

Act (Act of Feb. 5, 1948, 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328)), under which grant they allegedly retain servient and reversionary interests, that *Montana*'s rule of implicit divestiture does not apply. Br. of Pet'rs at 19-22. This argument misapprehends the general principles, explained most recently in *Bourland*, which are used to determine the existence of inherent tribal authority over nonmembers. There, the Court explained that such a power is an incidental, or lesser-included, element of its greater power to exclude nonmembers from its territory. *Bourland*, 508 U.S. at 691 ("an abrogated treaty right of unimpeded use and occupation of lands 'can no longer serve as the basis for tribal exercise of the lesser included power' to regulate"). It was not important how a tribe's exclusionary powers were extinguished: "[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control". *Id.* at 692.

Since under the Indian Rights-of-Way Act the Secretary of the Interior must obtain consent of the landowner (25 U.S.C. § 324) and must pay just compensation for the interest granted (*id.* § 325), it is plain that Congress "envisioned [that the] Indian interest in the land affected would be extinguished." *Swift Transportation, Inc. v. John*, 546 F. Supp. 1185, 1192 (D. Ariz. 1982), *vacated on mootness grounds*, 574 F. Supp. 710 (D. Ariz. 1983). Accordingly, "[i]t is axiomatic that designating these lands as a [highway] open to the general public is wholly inconsistent with an intent to allow the continued right of Indian occupancy." *Id.* Most important presently is the fact that,

as a result of the establishment of the right-of-way, the Three Affiliated Tribes retained no power to exclude non-members, rendering the highway the functional equivalent of the non-Indian fee land in *Montana* or the taken area in *Bourland*.

C. Amici's Contention That a Sovereign's Adjudicatory Authority May Exceed Its Legislative Authority Is Incorrect.

The United States and several other of Petitioners' amici attempt to draw support for their territorial jurisdiction argument by analogy to domestic conflict-of-laws principles. While beginning this argument with the unremarkable proposition that "[u]nder traditional choice of law principles, courts of one sovereign often adjudicate disputes using the substantive law of another sovereign" (Br. for United States as Amicus Curiae at 20), they then move to an entirely remarkable one: "[A] sovereign's adjudicatory jurisdiction commonly exceeds its powers to impose substantive rules of conduct" (*id.* at 20-21). *Accord* Br. of Assiniboine & Sioux Tribes et al., Amici Curiae at 12. Their argument fails for a number of reasons.

As a threshold matter, the broad assertion that the authority possessed by a sovereign's judiciary may exceed that of its executive or legislative branches is simply wrong. As the court of appeals noted, when deciding a case a court imposes normative principles that assign rights and responsibilities to the involved parties and thereby regulates their conduct. *BMW, Inc. v. Gore*, 116 S. Ct. 1589, 1597, n.17 (1996); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). The same is no

less true when a forum court applies the law of a foreign jurisdiction to resolve a controversy, since the underlying choice-of-law decision is governed by forum law. *See generally* Francis Wharton, *A Treatise on the Conflict of Laws* § 1a, at 10-11 (Parmele ed. 1905) ("when the Court of one state applies the law of another state, . . . it really applies a rule of the common law of the forum").

Aside from the quite practical fact that adjudication is a form of regulation, it cannot be forgotten that a court is created by and is no more than an instrument of the court's sovereign. Its "authority derives from constitutional provisions or from statutory provisions adopted in the exercise of a legislative authority, express or implied, to establish courts and provide for their jurisdiction." *Restatement (Second) of Judgments* § 11, cmt. a (1980). The jurisdiction of a sovereign's courts is thus simply a manifestation of the sovereign's more general power to affect the legal interests of persons. But if the sovereign itself does not have the power as a matter of its own inherent authority to affect a particular interest, a fortiori, its courts do not. *Cf. Restatement (Third) of Foreign Relations Law of the United States* § 431, cmt. a (1987) ("Under international law, a state may not exercise authority to enforce a law that it has no jurisdiction to prescribe").

It therefore is important, particularly in the context of tribal adjudicatory authority, to examine the power of the tribe itself to govern the relationship giving rise to the dispute. Indian tribes, as discussed above, hold a sui generis position within our legal system. They are not States, and their courts are not state courts. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989). It is inappropriate simply to pluck principles from a body of

law developed in a specific context and apply them elsewhere without carefully considering why they were developed, how they are intended to work, and what reciprocal responsibilities are attendant to them.

For example, when this Court considers the scope of state court jurisdiction it does so in the context of the textual role that States have within the constitutional structure. (U.S. Const. Amend. X; *see also Merrion*, 455 U.S. at 168 n.17 (Stevens, J., dissenting)) and the limitations on state authority otherwise contained in that structure (*e.g.*, U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause); U.S. Const. Art. IV, § 2 (Privileges and Immunities Clause); U.S. Const. Amend. XIV (Due Process Clause); U.S. Const. Amend. XIV (Equal Protection Clause)). The Court thus begins its analysis of state court authority

> with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are presumptively competent, to adjudicate claims arising under the laws of the United States.

Tafflin v. Levitt, 493 U.S. 455, 458 (1990). However, at least with respect to external relations, *Montana* teaches that neither Indian tribes nor their courts can lay claim to the same axiom or presumption. *See Merrion*, 455 U.S. at 168-73 (Stevens, J., dissenting); *cf. Brendale*, 492 U.S. at 429 (White, J.) (criticizing lower court's equation of tribal

inherent authority with a local government's police power).

The United States implicitly acknowledges the awkward result achieved by its approach in advancing the argument that the merits of federal, but presumably not state or tribal, law-based tribal court decisions should be reviewable. Br. for United States as Amicus Curiae at 23 n.13. In making this argument the United States first fails to explain why a tribal court's exercise of a tribal court's authority over "an ordinary private civil dispute" would be immune from challenge on jurisdictional grounds, while challenges to the "taxing or regulatory authority of the Tribe itself" would not. *Id.* at 17 n.10. It also fails to reconcile its suggestion that federal courts will stand as courts of appeal for federal legal questions decided by tribal courts with *Iowa Mutual*, where the Court explained that, "[u]nless a federal court determines that the Tribal Court lacked jurisdiction, . . . proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts." 480 U.S. at 19.

But even assuming that federal courts may stand in review of tribal court federal law-based decisions on nonjurisdictional issues, the United States fails to explain how its proposed rule is relevant here where it also suggests that state law governs. Br. for United States as Amicus Curiae at 23. Since it is unlikely the United States is suggesting that state courts are similarly entitled to entertain appeals from tribal courts, how does the United States propose to prevent States from becoming balkanized through unreviewable tribal court interpretations of state law? It is plainly untenable to suggest that a

North Dakota statute, for example, may be subjected to final interpretations by four different courts: the North Dakota Supreme Court and three different tribal appellate courts. Such an approach would frustrate the States' ability to implement their laws and policies in a consistent manner and undermines fundamental elements of state sovereignty. Furthermore, given the concurrent jurisdiction of state courts alluded to by the United States, adopting its approach would create the specter of forum-shopping and interjurisdictional conflict.

The Government's argument, in short, makes no practical or legal sense other than to further its own interests when consigned (improperly in the amici States' view) to tribal court for the purpose of litigating federal law claims. *See United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996); *United States v. Plainbull*, 959 F.2d 724 (9th Cir. 1992). The more logical response to the United States' concern is that tribal courts possess jurisdiction over nonconsenting nonmembers for the purpose of applying tribal, not federal or state, law to the merits of a dispute because they cannot adjudicate that which they cannot regulate. That response does not conflict with *Iowa Mutual*'s admonition concerning nonreviewability of the merits of tribal court decisions since there tribal law was assumed to govern resolution of the underlying tort claim. *Iowa Mutual*, 480 U.S. at 12, 17; *see also id.* at 22 n.* (Stevens, J., concurring in part and dissenting in part).

III. THE RESPONDENTS DID NOT CONSENT TO TRIBAL COURT JURISDICTION, AND THE SECOND *MONTANA* EXCEPTION DOES NOT OTHERWISE PROVIDE A BASIS FOR DIRECT TRIBAL AUTHORITY.

As a fallback Petitioners argue that the involved automobile accident was a "reasonably foreseeable" consequence of Respondents' contract with the Tribes for purposes of the first *Montana* exception (Pet. Br. at 27-28) and that, with respect to the second *Montana* exception, Respondents' allegedly tortious conduct against a member of the "reservation community" threatened the Tribes' economic security and political integrity (*id.* at 29-30). If either of these arguments were adopted, the principles of *Montana* and its progeny would be emasculated.

A. *Montana*'s Consent Exception Should Not Be Construed So Broadly as to Swallow the General Rule.

No tenable argument can be made that Respondents consented to tribal court jurisdiction. Literally read, the first *Montana* exception provides that the tribes may regulate nonmembers who enter into "commercial deal[s], contracts, leases, or other arrangements" with the Tribe or its members. *Montana*, 450 U.S. 565. However, as the court of appeals observed, this case involves a "simple personal injury . . . claim arising from an automobile accident, not a dispute arising under the terms of, out of, or within the ambit [of] the subcontract between the tribes and A-1." Pet. App. at 21. It is irrelevant that at the time of the accident respondent Stockert was performing

services attendant to A-1 Contractors' agreement with the Tribes, because he possessed the right to be on the state highway independently of his employer's contractual relationship with the Tribes.

Put differently, Stockert required no permission from the Tribes to drive A-1 Contractors' vehicle on the highway, since no question exists that the Tribes were, and are, powerless to control access to that road and have not attempted to do so. *See Bourland*, 508 U.S. at 693 (reservation of mineral, grazing and timber rights in taken lands did "not operate as an implicit reservation of all former rights"); *Brendale*, 492 U.S. at 439 (Stevens, J.) (distinguishing between "open" and "closed" areas of a reservation where the tribes "operate[d] a 'courtesy permit system' that allows selected groups of visitors access to the closed area"). A contrary result would mean that, in *Montana*, the Crow Tribe could have established consent jurisdiction over nonmembers who hunted and fished on nonmember fee lands because they purchased ammunition or fishhooks from a tribally-owned store or that, in *Colville*, nonmembers traveling to or from tribal smokeshops could be sued in tribal court for accidents occurring on the highway because they had consented impliedly to tribal regulatory jurisdiction by the intended or actual purchase of cigarettes. In sum, unless the consent exception is transformed into a species of legal fiction where actual consent to tribal jurisdiction is not required, the predicate for that exception's application is absent here. Nothing in the Tribes' contractual relationship with A-1 Contractors, so far as the record shows, speaks to the issue of tribal law governing liability for

accidents with third parties like petitioner Gisela Fredericks.

B. The Second *Montana* Exception Does Not Provide a Basis for Direct Tribal Authority Over Nonconsenting Nonmembers.

While the court of appeals correctly concluded that the tribal court did not possess authority over the Respondents under the second *Montana* exception, the amici States submit that it did so for the wrong reason: After *Brendale*, it is no longer appropriate to contend that the second exception can serve as an independent basis for tribal authority over nonmembers but instead serves to identify tribal interests which may be protected by proceedings in federal or state courts. Central to this conclusion is a proper understanding of how the second *Montana* exception was explained in *Brendale*.

Brendale involved the question whether the Yakima Nation had authority to impose its zoning ordinance on two different parcels of land owned in fee by nonmembers of the Nation. The parcel owned by Philip Brendale was located in an area of the Reservation which was almost wholly Indian-owned and which had traditionally been closed to non-Indian entry. 492 U.S. at 415-16. The other parcel was owned by Stanley Wilkinson and was located in an area of the reservation where, by virtue of allotment-era policies, access was not restricted and over half of the land was owned by nonmembers of the Tribes. *Id.* at 416-17. In three plurality opinions the Court upheld the Tribes' power to enforce its zoning ordinance with respect to the Brendale parcel (*id.* at 444) but denied the

Tribes' power to do so with respect to the Wilkinson land (*id.* at 432).

Justice White, who wrote the controlling opinion with respect to the Wilkinson parcel, explicitly rejected the notion that any "direct effect" on a protectable interest may form a basis for the exercise of inherent authority over nonconsenting nonmembers. Stressing the use of the word "may" in the formulation of the second *Montana* exception (450 U.S. at 566), Justice White reasoned that employment of the conditional term "indicate[d] . . . that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances." *Brendale*, 492 U.S. at 428-29. Justice White then explained that the lower court had incorrectly "transform[ed] this indication that there may be other cases in which a tribe has an interest in activities of nonmembers on fee land into a rule describing every case in which a tribe has such an interest." *Id.* at 429.

In the context of zoning regulation, Justice White found the prospect of tribal regulation "chaotic" because the tribe's jurisdiction "would last only so long as the threatening use continued," would "depend in the first instance on a factual inquiry into how a tribe's interests are affected by a particular use of fee land," and would likely "switch[] back and forth" with county regulation, "depending on which uses the county permitted on the fee land at issue." *Id.* at 429-30. Instead, "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance *or actions in the tribal courts*, to regulate

the use of fee land" (*id.* at 430) (emphasis added) but rather that:

> *Montana* suggests that in the special circumstance of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But, as we have indicated above, that interest does not entitle the tribe *to complain or obtain relief* against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe. This standard will sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners.

Id. at 430-31 (emphasis added). Justice White thus clarified that the second *Montana* exception does not serve as a basis for direct tribal authority but instead that a complainant tribe's recourse lies in a federal-law cause of action designed to protect the interests identified in the exception, as Justice Blackmun correctly recognized. 492 U.S. at 460 (Blackmun, J., concurring in part and dissenting in part).

Justice Stevens agreed with this aspect of Justice White's opinion, although on somewhat narrower grounds. He distinguished between what he characterized as the "closed" and "open" areas of the Yakima

Reservation, and with respect to the former found *Montana*'s presumption against tribal authority over nonmembers inapplicable. *Id.* at 443. With respect to the "open" area, i.e., an area where federal laws had operated to deprive the tribe of territorial exclusivity, Justice Stevens concurred with Justice White "that the tribe lacks authority to regulate the use of [petitioner] Wilkinson's property," explaining that "so long as [Wilkinson's] land is not used in a manner that is preempted by federal law, the Tribe has *no special claim for relief.*" *Id.* at 445 (emphasis added). Given the context, it is clear that the "special claim for relief" to which Justice Stevens was referring was the one discussed earlier by Justice White. This understanding of Justice Stevens' opinion also comports with his concern, expressed earlier, over subjecting nonmembers to the powers of governments to which they have not given their consent and in which they cannot participate. *Merrion*, 455 U.S. at 172-73 (Stevens, J., dissenting). Thus, as to the open area, Justice Stevens did not view the second exception as relevant.

Bourland did nothing to alter this aspect of *Brendale*. It simply reaffirmed the rule announced in *Montana* that "when Congress . . . broadly opened up [reservation] land to non-Indians, the effect of that transfer [was] the destruction of [any] pre-existing Indian right to regulatory control." *Bourland*, 508 U.S. at 692. While the *Bourland* Court did observe that on remand "[t]he question remains . . . whether the Tribe may invoke" (*id.* at 695) either of *Montana*'s exceptions, it did not suggest that such invocation necessarily meant that, if met, the tribe would be able to exercise direct regulatory authority over nonmembers. It would make little sense to conclude that

in this remark the *Bourland* Court intended the lower courts to apply *Montana* to the exclusion of the otherwise relevant portions of *Brendale*. Instead, the more reasonable understanding is that the Court contemplated that the lower court's application of *Montana* on remand would proceed with due regard for all controlling authority, including *Brendale*.

The amici States submit that the reasoning of Justice White with respect to the second *Montana* exception, i.e., that it does not provide a basis for finding direct tribal authority over nonconsenting nonmembers but instead serves to identify a federal interest that may be enforced against nonmembers in federal or state forums, should be explicitly adopted by the Court. The reasons for this are two. First, the second *Montana* exception does not function as a predictable, principled and objective mechanism for determining when and where tribal authority over nonconsenting nonmembers exists. As noted by amicus curiae Yavapai-Apache Tribe, cases decided by the lower courts under the second *Montana* exception have varied at the whim of the decisionmaker. Br. of Amici Curiae Yavapai-Apache Nation, et al. at 25 n.22. In those cases the concepts of "direct effect," "health and welfare," "political integrity" and "economic security" have been interpreted as encompassing both very much and very little. The explanation for these seemingly incompatible results lies in the fact that the second exception calls as much for a value judgment as for the determination of an objectively ascertainable fact. Because of this, in the hands of some decisionmakers it can be applied so as to swallow the presumptive rule. *See generally* Bradley B.

Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 263 (1991).

Second, and more important, Justice White's approach strikes an appropriate balance between the interests of the tribe and those of nonconsenting nonmembers. It is not possible to square the notion that Indian tribes have the power to "impose [their] public policy . . . on those outside [their] community" (*Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474 n.9 (9th Cir. 1989)), with the principle that it is "the consent of the governed [that] provides the fundamental basis for power within our constitutional system." *Duro*, 495 U.S. at 694. Justice White's approach allows for the recognition and enforcement of a tribe's laws and policies, but does so with respect to nonconsenting nonmembers through the intermediation of courts to which the latter have consented and which accord them the full panoply of constitutional protections as a matter of right. Moreover, viewing the second *Montana* exception in this manner will ultimately free a tribal court to adjudicate disputes over which it does have jurisdiction in ways that are fully consistent with its own laws, customs, and practices since they will govern the controversy's outcome. The amici States thus submit that the rule which should govern this and like cases is that Indian tribes may exercise governmental powers over a nonmember where the nonmember has consented unequivocally to such power consistent with the principles outlined above. *See generally* Gould, 96 Colum. L. Rev. at 901.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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